



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: OCTOBER 11, 2022

IN THE MATTER OF:

Appeal Board No. 623666

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective June 29, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by UB'S MERCANTILE LLC prior to June 29, 2021 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed May 19, 2022 (), the Administrative Law Judge overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Our review of the record reveals that the case should be remanded to hold a further hearing. The parties were not properly confronted with, shown, and/or given an opportunity to object to documents marked as Hearing Exhibits 11, 14, and 15, documents considered and relied upon by the hearing Judge in deciding the case. The case shall be remanded for the appropriate confrontation and opportunity for objection with respect to these documents. In addition, further testimony and other evidence is needed to decide whether the claimant's behavior amounted to misconduct for unemployment insurance purposes.

Therefore, at the further hearing, the documents that are marked in the file as Hearing Exhibits 11, 14, and 15 shall be properly marked on the record, and received into evidence after the parties are confronted with them, and given

the chance to object to their entry into the record.

In addition, the employer shall produce a copy of its attendance policy, including evidence of the consequences of violating the policy, and evidence that the claimant received this policy or was otherwise on notice of it. The employer shall also produce copies of any warnings given to the claimant in connection with her attendance, and evidence to establish the date on which she told the claimant that she could not miss any more work or her job would be in jeopardy. The employer is further directed to produce evidence of the claimant's work schedule and attendance from March 29, 2021 (the date she began her employment) through July 7, 2021.

The parties are directed to provide complete, legible copies of all text communications between the claimant and the owner from May 15, 2021 through July 7, 2021. The copies provided must indicate the date and time the messages were sent, and shall include, but not be limited to, the correspondence between the claimant and the employer that resulted in the text message sent at 10:18 AM on July 7, 2021, and received into evidence as Hearing Exhibit 1.

The claimant shall be questioned regarding whether she was aware of the employer's attendance policy, whether her actions complied with the policy, and whether the employer had ever warned her either orally or in writing about excessive absenteeism, and if so, the date and contents of that warning.

The claimant shall also be questioned regarding the reasons for her failure to report to work as scheduled on July 1, 3 and 4, 2021, and whether she had arranged for coverage for her shifts on those dates. She shall be prepared to explain her reason for not meeting with the employer/owner on July 7, 2021 to discuss her request for maternity leave.

The employer shall be asked whether the claimant would have been fired on July 7, 2021 if she had met with the employer as requested to discuss her request for maternity leave, and why the claimant was not put on a schedule to work after July 4, 2021.

Copies of text messages in the file at pages 6 through 14 shall be properly identified, marked, and received into evidence after the appropriate confrontation and opportunity for objection, if these messages are not duplicates of what the parties have produced at the remand hearing.

All relevant documents produced upon remand shall be received into evidence after the appropriate confrontation and opportunity for objection.

The parties are placed on notice that failure to produce the evidence directed by the Board may result in the hearing Judge or the Board taking an adverse inference against that party, determining that the evidence not produced would not have supported that party's position.

The hearing Judge may receive any other evidence necessary to decide the matter.

Now, based on all of the foregoing, it is

ORDERED, that the decision of the Administrative Law Judge be, and the same hereby is, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issue of misconduct, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above

actions to be taken, and so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the initial determination disqualifying the claimant from receiving benefits on the basis of misconduct, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

JUNE F. O'NEILL, MEMBER